MOTION FILED
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NO. 85-426

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SAVE THE DUNES COUNCIL, INC.,

Petitioner,

and

UNITED STATES OF AMERICA,

Respondent,

v.

36.96 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA, AND NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF SIERRA CLUB AS AMICUS CURIAE SUPPORTING PETITIONER
and
BRIEF OF SIERRA CLUB AS AMICUS CURIAE SUPPORTING PETITIONER

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November 15, 1985

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Sierra Club respectfully moves, pursuant to Supreme Court Rule 36.1, for leave to file the attached Brief of

Sierra Club as Amicus Curiae Supporting Petitioner.

Sierra Club is an environmental conservation organization with in excess of 350,000 members. The Club has local chapter and membership groups which, from time to time, become involved and interested in local conservation issues.

Like Petitioner, Save the Dunes Council, Inc. (hereinafter "Council"), the Club has been directly involved with issues of land acquisition and management. Although the Club often lacks a narrow legal or equitable ownership interest in the land at issue, the Club, nevertheless, is interested in land use and conservation, and the effective performance of congressionally authorized or mandated duties of the Secretary of the Interior. To protect its identifiable interests, the Club has

participated in litigation, both as plaintiff and intervenor.

The decision of the Seventh Circuit is an announced departure from the decisions of this Court and other circuits regarding intervention of right under Fed. R. Civ. P. 24(a)(2). The decision below may seriously impede the ability of the Club and its members to seek adequate representation in actions that may impair their demonstrable interests. Because of the potentially adverse impact of the Seventh Circuit decision on the legitimate right of the Club and its members to intervene in appropriate cases, the Club should be allowed to participate as an amicus curiae.

Neither the Secretary of the Interior nor Northern Indiana Public Service Company (hereinafter "NIPSCO") will

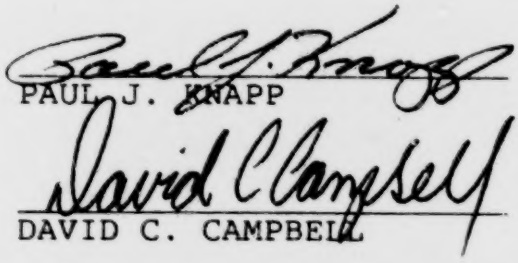
adequately address the scope of the Seventh Circuit decision beyond its narrow limits. The Council's interest is limited, as it should be, to the particular issues surrounding the Indiana Dunes National Lakeshore. The Club's participation, as amicus, would be helpful to the Court in exploring the broader implications of the decision below not only in placing the decision in proper historical context of the developing law of intervention but also in understanding its precedential effect.

Although the Council and the Solicitor General, on behalf of Respondent, United States of America, consented to the filing of an amicus curiae brief by Sierra Club, Respondent, NIPSCO, refused to give its consent. Therefore, Sierra Club respectfully moves this Court for leave to file the attached

Brief of Sierra Club as Amicus Curiae

Supporting Petitioner.

Respectfully submitted,



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INTEREST OF AMICUS CURIAE

Amicus curiae Sierra Club is a nonprofit corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at 530 Bush Street, San Francisco, California 94108. The Sierra Club is a national conservation organization with membership in excess of 350,000.

The objectives of the Sierra Club include conservation, the protection and sound management of natural resources, and the preservation and enhancement of the environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy and preserve the scenic resources of the United States and its forests, waters, wild life and

> wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and corporation in protecting them.

The Club's members pursue many diverse outdoor recreational pursuits on the public lands, including hiking, boating, nature study and camping. These outdoor recreational pursuits depend in large measure on the Secretary of Interior's effective performance of land acquisition and management duties authorized by Congress, including those of 16 U.S.C. section 460u-12.

The procedural vehicle of intervention allows the Club and its members to seek adequate representation in actions which could impair their interests. The Seventh Circuit's

decision below, denying the Save The Dunes Council, Inc. (hereinafter "Council") the right to intervene in an action brought pursuant to 16 U.S.C. section 460u-12, severely undermines the vitality of Rule 24. The Seventh Circuit decision misapplies the "interest" requirement of Rule 24(a)(2), overlooks the Rule's underlying policy, conflicts with decisions of this Court and other Circuits and most certainly will have a deleterious effect on the ability of the Club and other groups whose demonstrable interest is not adequately represented from properly intervening in actions in which their interest will or may be impaired.

REASON FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S ANALYSIS OF THE NATURE OF THE "INTEREST" REQUIRED TO INTERVENE IS CONTRARY TO DECISIONS OF THIS COURT AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THE POLICIES THAT UNDERLIE RULE 24

The Seventh Circuit's analysis of whether a particular interest is sufficient for the purpose of intervention is fundamentally flawed because it excludes all interests except traditionally recognized legal interests.

In the instant case, the Seventh Circuit looked to the nature of the underlying proceeding, eminent domain, and identified only the two traditional "legal" interests involved in such an action. Because the Council possessed neither the eminent domain power of the sovereign nor a private ownership interest in the property being condemned, the Seventh Circuit held that the Council

lacked "direct, significant legally protectable interest" required for intervention. United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985).

This narrow interpretation of "interest relating to the property or transaction," Fed. R. Civ. P. 24(a)(2), is precisely what this Court in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133 (1967), rejected as an overly restrictive interpretation of even the pre-1948 Rule 24:

> Under old Rule 24(a)(3) those "adversely affected" by a disposition of property would usually be those who have an interest in the property. But we cannot read it to mean exclusively that group.

Noting the elasticity of the Rule, the Court in Cascade suggested one approach to identifying "interest": look to interests which go to the "heart of

the controversy." Id. at 135. See also Missouri-Kansas Pipeline Co. v. United States, 312 U.S. 502, 506 (1941) (intervention permitted where applicants risked economic damage but had no direct legal interest in the underlying transaction). Thus, the notion that only traditional legal interests are sufficient for intervention of right has been rejected.

The Seventh Circuit's reliance on Donaldson v. United States, 400 U.S. 517 (1971), is unavailing. Nothing in Donaldson supports the proposition that only a traditional legal right in a disputed property or transaction meets the interest test. Donaldson's contribution to the interpretation of Rule 24(a)(2) is to define "interest" as requiring "a significantly protectable interest." Id. at 531. This Court has recognized that certain nontraditional

interests, including environmental interests, are indeed significant protectible interests, at least in the context of standing. Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. SCRAP, 412 U.S. 669 (1973); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). Contrary to the decision below, it is well established that the interest requirement for intervention is less stringent than the interest requirement for standing. Trbovich v. United Mine Workers, 404 U.S. 528 (1972). In fact, the Seventh Circuit previously so held. United States v. Board of School Commissioners, 466 F.2d 573, 577 (7th Cir. 1972), cert. denied sub nom. Citizens of Indianapolis for Quality Schools v. United States, 410 U.S. 909 (1973).

Although this Court has not addressed the specific issue of whether environmental interests are significantly protectible interests in the context of Rule 24, the Ninth Circuit has addressed the issue and its decisions are in sharp conflict with the Seventh Circuit.

The case most analogous to the present action is Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983). There, the Ninth Circuit rejected the district court's holding that because the proposed intervenor, the Audubon Society, had no legal interest in the land which was the subject matter of the suit, it lacked sufficient interest for intervention. The Ninth Circuit first recognized that a public interest group is entitled as a matter of right to intervene in actions challenging the legality of measures which the group has supported. Id. at 527 (citing Washington

State Building & Construction Trades v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied sub nom. Don't Waste Washington Legal Defense Foundation v. Washington, 461 U.S. 913 (1983); Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980)). The Sagebrush court went on to hold that because "[a]n adverse decision in this suit would impair the Society's interest in the preservation of birds and their habitats," the very reason for the Society's creation and existence, the Society possessed sufficient interest to intervene. Sagebrush, 713 F.2d at 527.

Such "nonlegal" interests in disputed property or transactions have been recognized as sufficient for intervention by other circuit and district courts. Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) (state banking commissioner allowed to intervene in action which could result in federal sanction of a bank in

commissioner's state); West Virginia Highlands Conservancy, Inc. v. Watt, 32 Fed. R. Serv. 2d (Callaghan) 1462 (N.D.W. Va. 1981) (specific legal or equitable interest in the chose is not required); United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972) (the right of environmental groups to intervene must be viewed in light of the interest which they seek to represent as well as in light of the nature of the particular litigation). In none of these cases was the proposed intervenor required to have a narrow legal or equitable interest in the property or transaction at issue.

Intervention involves an accomodation between two potentially conflicting goals: "to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly

complex or unending." Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969). In Smuck, Chief Judge Bazelon suggests that in balancing these goals "the first requirement of Rule 24(a)(2), that of an 'interest' in the transaction, may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others." Id.

Courts subscribing to this approach have done so because they view the "interest" test as a threshold rather than the determinative criterion for intervention. Id.; Nuesse, 385 F.2d at 700; County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980).

Such an approach to determining intervention of right has its foundation in the 1966 amendment of Rule 24. As

stated by Professor Benjamin Kaplan, draftsman of the amendment, "[t]he changed wording of the Rule was intended . . . to drive beyond the narrow notion of an interest in specific property." Kaplan, Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 405 (1967). Professor Kaplan emphasizes that:

> New Rule 24(a)(2) invites us to see that the practical consequence to the applicants of being denied intervention is that they cannot stop a settlement nor, if dissatisfied with the decree entered after consent, press their contention on appeal; they are remitted, instead, to subsequent independent private actions in which it would be hard (although not impossible) to induce the courts to grant them better relief than was accorded by the settlement. This factor can weigh for intervention; it is a matter for consideration from case to case.

Id.

This change in the wording of the Rule suggests that courts should read "interest" more broadly and shift their scrutiny to the questions of whether the interest will be impeded by the proceeding's outcome and whether the interest is adequately represented by existing parties.

The amended language of Rule 24(a) was applauded as a directive to eliminate "the temptation or need for tangential expeditions in search of 'property' or someone 'bound by a judgment.'" Smuck, 408 F.2d at 179. As Judge Bazelon cautioned: "It would be unfortunate to allow the inquiry to be led once again astray by a myopic fixation upon 'interest.'" Id.

This amicus curiae submits that the court below has indeed gone astray in its preoccupation with identifying a legal

"interest" of the Council to warrant intervention. Unquestionably, the Council has a significant and substantial interest in seeing that the Secretary of Interior complies with Congress' directive to condemn and purchase the land in question for inclusion in the Indiana Dunes National Lakeshore. Indeed, it is fair to say that if it were not for the Council's diligent efforts over the span of 30 years and in particular its sponsorship of the very bill mandating purchase of the land, there would be no judicial proceeding in which to intervene.

Clearly, the Council's interest in the property at issue meets the threshold required for intervention.

Certainly, the Secretary should not be allowed to flout his legislative mandate to the specific detriment of the Council, without the Council being

allowed to speak. United States v. 36.96 Acres of Land, 754 F.2d at 862 (Cudahy, J., dissenting). Further, individuals and groups such as the Council and the amicus should not be arbitrarily deprived of the right to intervene in a proper case because of a technical and overly restrictive interest requirement. The Council's history and its nexus with the property at issue are clear. Its interest is worthy of protection. To recognize that its interest is "demonstrable," id. at 859, but not "legally protectable" is an artificial distinction. As modern Rule 24 is intended to remove artificial barriers to entry of litigants in appropriate cases, the barriers erected by the Seventh Circuit should be removed as well.

CONCLUSION

Because the Seventh Circuit decision below is contrary to decisions of this Court and other Circuits and undermines the purpose of Rule 24, the petition for a writ of certiorari submitted by Save The Dunes Council, Inc. (No. 85-426) should be granted.

Respectfully submitted,

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CERTIFICATE OF FILING

CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 28.5(b), I, Paul J. Knapp, a member of the Bar of the Court, representing Sierra Club, the amicus herein, hereby certify that on the 15th day of November, 1985, in accordance with Sup. Ct. R. 28.2 and 28.3, I deposited in the United States Post Office located at the Federal Building, 46 East Ohio Street, Indianapolis, Indiana 46204, with first class postage prepaid, one original and 40 photostatic copies of amicus Sierra Club's Motion for Leave to File Brief of Sierra Club as Amicus Curiae Supporting Petitioner and Brief of Sierra Club as Amicus Curiae Supporting Petitioner, addressed to the Clerk of the United States Supreme Court for filing and further by the same method served three photostatic copies of the same to the following counsel:

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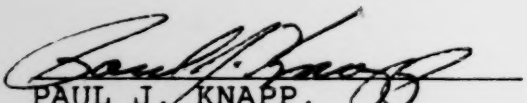

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